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DEC 12 1990

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In the Supreme Court of the United States

OCTOBER TERM, 1990

**LOWELL SAYLOR, OREGON TRAIL
RANCHES, INC., and ALFALFA
ACRES, INC.,**

Petitioners,

v.

**STATE OF OREGON WATER
RESOURCES DEPARTMENT,
and MICHAEL F. LADD,
WATERMASTER, DISTRICT 5,
OF THE STATE OF OREGON
WATER RESOURCES DEPARTMENT,**

Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF OREGON**

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Are plaintiffs entitled to attorney fees under 42 U.S.C. § 1988 when they conceded before the state trial court that their federal constitutional claim was unnecessary to their success on their state law claim?



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FOR THE YEAR 1891

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BRIEF IN OPPOSITION

Defendants accept plaintiffs' statement of the opinions below and the constitutional and statutory provisions involved.¹

JURISDICTION

Although plaintiffs filed a timely petition for certiorari, the state court judgment is not final in that it does not resolve all plaintiffs' claims against defendants. See 28 U.S.C. § 1257(a). The Court, however, has jurisdiction under section 1257(a) because the judgment may be considered final under the second exception identified in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480 (1975). See note 7 *infra*.

STATEMENT OF THE CASE

This case arises out of a dispute over a 1916 state water rights decree. The decree allocates among various users the right to take a specified number of cubic feet per second of water from Butter Creek,² it sets the priority of use, and it describes the way in which water will be distributed. Because of the limited stream flow in Butter Creek, taking a steady stream of water from the creek did not provide sufficient water to irrigate a user's fields in 1916.³ Accordingly, a practice known as accumulation arose where one farmer would use the entire stream flow for a short period of time and effectively

¹ Plaintiffs quote the Supremacy Clause and the Fifth Amendment as the two constitutional provisions that are pertinent to their petition. (Pet. Cert. 4-5). Because, as explained below, plaintiffs limited themselves to the claim that the state's actions violated substantive due process, it would appear that the Fourteenth, not the Fifth Amendment is the relevant constitutional provision.

² Butter Creek is located in eastern Oregon, which is more arid than the western part of the State. The stream flow in Butter Creek diminishes during the year, and the creek usually goes dry in June or July.

³ In 1916, fields typically were irrigated by flooding.

borrow against his future right to draw a more limited steady stream of water. The users who deferred taking water would accumulate their water rights for future use.

The Oregon Attorney General's office determined that this local practice violated the 1916 decree, unless the water users signed an agreement each year adopting the practice. Acting on the Attorney General's advice, defendant Michael Ladd, the local watermaster, told the water users that if they wanted to distribute water by accumulation, they would have to sign an agreement. Until they did, they would continue to receive a steady stream of water pursuant to the 1916 decree. Three of the water users, plaintiffs in state court and petitioners here, declined to sign the agreement.⁴ Although plaintiffs did not object to any of the agreement's terms, which effectively described the practice of accumulation, they did object to being denied the right to accumulate until they signed the agreement.

Plaintiffs sued in state court claiming that requiring them to sign the agreement violated both the 1916 decree and "plaintiffs' rights, privileges and immunities secured by the Constitution and the laws of the United States." (Complaint, ¶¶ 9-11). Shortly after they filed suit, plaintiffs moved for a preliminary injunction solely on the ground that the 1916 decree contemplated that water rights would be distributed by accumulation. (See Plaintiffs' Motion and Memorandum for a Preliminary Injunction at 1).⁵ The state trial court granted their motion. It found that because the 1916 water rights decree did authorize accumulation, no prior signature was or could be required.

⁴ The three users were Lowell Saylor, Oregon Trail Ranches, Inc., and Alfalfa Acres, Inc. The two corporate entities are controlled by Saylor and, for all practical purposes, are indistinguishable from him.

⁵ Plaintiffs' memorandum did not refer to federal law as a basis for requesting injunctive relief. Rather, it relied solely on state law.

At the hearing on the preliminary injunction motion and before the trial court issued its ruling, defendants moved to strike plaintiffs' federal claims from the complaint.⁶ Plaintiffs responded that defendants' motion to strike was premature. They argued:

Whether those [federal] paragraphs are in the case or not in the case, for the purposes of the application for preliminary injunction, it *doesn't make any difference because what we're asking the Court to do is today, Your Honor, is to enforce the [1916 state water rights] decree.*

(Tr. 92; emphasis added). Plaintiffs noted their position that substantive due process precluded the state from acting arbitrarily, but added:

But again, those Motions to Strike[,] Your Honor, I think are properly considered by the Court at a later time. We don't really need to talk about them today, because what we're asking for is a preliminary injunction.

(*Id.*). The state trial court agreed that defendants' motion to strike the federal claims was premature. (Tr. 93-94). It reasoned: "This is not a hearing on the merits, it's a hearing for preliminary injunction, and other relief." (*Id.*).

After the state trial court issued the preliminary injunction, plaintiffs sought attorney fees, pursuant to section 1988, for the work their attorneys had done to obtain the preliminary injunction. The trial court awarded them fees and entered partial final judgment for those fees. OR. R. Civ. P. 67B.⁷ The state appealed the partial judgment, the Oregon

⁶ Motions to strike are used more frequently in state than in federal practice. Had defendants been in federal court, the comparable motion would have been a Rule 12(b)(6) motion to dismiss plaintiffs' federal claim.

⁷ Rule 67B, like its federal counterpart, Rule 54(b), FED. R. Civ. P., allows a trial court to enter judgment on fewer than all the claims. Since plaintiffs obtained the preliminary injunction, they have not pursued the underlying merits of their claims further. It appears that the partial judgment for which plaintiffs seek review will not be altered by any subsequent proceedings and is final for the purposes of section 1257(a).

Court of Appeals reversed, *Saylor v. Water Resources Dept.*, 100 Or. App. 745, 788 P.2d 494 (1990), and the Oregon Supreme Court denied discretionary review, 310 Or. 122, 794 P.2d 794 (1990). Plaintiffs have petitioned for a writ of certiorari to the Oregon Court of Appeals to review its judgment.

Before turning to the reasons why certiorari should be denied, it is perhaps helpful to describe the nature of plaintiffs' federal claim. Plaintiffs' federal constitutional theories at trial were broad. They argued that requiring them to sign an agreement took their water rights. They presented their federal argument as an amalgam of procedural due process, substantive due process, and a takings claim. In response to defendants' appeal in the state court, plaintiffs limited their federal claim to substantive due process. (Resp. Br. 6). Arguing that "*Muller* [*v. Oregon*, 208 U.S. 412 (1908)] is the leading decision of the United States Supreme Court relating to the scope of *substantive due process*," (Resp. Br. 9; emphasis in original), plaintiffs contended that the State's interpretation of the 1916 water rights decree was arbitrary and irrational.

REASONS TO DENY CERTIORARI

The question presented by the facts of this case is neither difficult nor significant. The Court has held that when a plaintiff joins a non-fee generating claim and a fee generating claim, the fact that the case is decided on the basis of the non-fee claim does not preclude an award of fees under section 1988. *Maher v. Gagne*, 448 U.S. 122 (1980). Rather, attorney fees may be awarded "when the claim upon which a plaintiff actually prevails is accompanied by a 'substantial,' though undecided, § 1983 claim arising from the same nucleus of facts" *Smith v. Robinson*, 468 U.S. 992, 1002 (1984).

The Court has been careful to recognize, however, that "[d]ue regard must be paid, not only to the fact that a plaintiff 'prevailed,' but also to the relationship between the claims on

which effort was expended and the ultimate relief obtained." *Id.*, at 1006. It accordingly noted that "where it is clear that the claims that provide for attorney's fees had nothing to do with a plaintiff's success, *Hensley v. Eckerhart*, [461 U.S. 425 (1983),] requires that fees not be awarded on the basis of those claims." *Id.*, at 1009 n. 12.

These well-settled principles control this case. Plaintiffs told the state trial court that their federal claim "doesn't make any difference [to the relief they requested] because what we're asking the Court to do . . . today, Your Honor, is to enforce the [1916 state water rights] decree." It is hardly surprising that the Oregon Court of Appeals reversed the attorney fee award because plaintiffs' federal claim was "unnecessary" to the relief they obtained. See *Saylor v. Water Resources Dept.*, 100 Or. App., at 746. At that juncture, state law provided the sole basis for the relief. Moreover, plaintiffs' disclaimer of any reliance on federal law was proper. Their federal substantive due process claim, based principally on pre-*Nebbia*⁸ caselaw, was so frivolous as to be insubstantial. *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); Linde, *Without "Due Process,"* 49 OR. L. REV. 125, 160-64 (1970); see *Bell v. Hood*, 327 U.S. 678 (1946).

⁸ *Nebbia v. New York*, 291 U.S. 502 (1934). As then professor Hans Linde remarked about reliance on pre-*Nebbia* decisions:

It is not for nothing that briefs and lower court opinions adverse to a challenged regulation invariably rely on Supreme Court citations older than 1933, while the Supreme Court's own opinions invariably cite the same lengthening chain of post-*Nebbia* decisions monotonously rejecting these challenges. In part, this almost schizophrenic divergence of perception of the governing precedents in "substantive due process" litigation may no doubt be attributed to cultural lag. But in part it reflects the reluctance of state judges, and naturally of litigants, to abandon the comfortable old assumptions about judicial relief from unreasonable regulation, even when its one-time premises have shrunk into an episodic aberration of the distant past.

Linde, *Without "Due Process,"* 49 OR. L. REV. 125, 163-64 (1970); (footnote omitted).

Plaintiffs' petition for certiorari never discusses the nature of their federal claim, nor does it ever mention the fact that they told the state trial court that their federal claim "doesn't make any difference" to the relief they were requesting.⁹ Rather, their petition takes a broader and less specific focus. They claim that after *Saylor*, "a potential right to relief under state law now means that § 1988 fees will not be available in Oregon state courts." (Pet. Cert. 19). In defendant's view, plaintiffs interpret Oregon law too broadly in at least two respects.

First, plaintiffs' reading of Oregon law rests on their assumption that "[t]he present case falls squarely within the rule of *Maher* [*v. Gagne*]," (Pet. Cert. 15). It follows, they reason, that the denial of their request for attorney fees must mean that the Oregon courts have written *Maher* off the books. The difficulty with this reasoning is that, as explained above, plaintiffs stand in quite a different position from the plaintiffs in *Maher*. One should be hesitant to assume that the Oregon courts have eviscerated *Maher*, as plaintiffs argue, when the decision in this case is virtually compelled by the combination of plaintiffs' admissions and *Smith v. Robinson's*

⁹ Nor do plaintiffs mention that they most likely never had standing to raise a federal constitutional claim in the first place. The agreement that plaintiffs claim deprived them of their water rights expressly provides:

Notwithstanding any other provision herein to the contrary, no party recognizing this agreement shall suffer any loss or reduction of water rights on account of such recognition or participation in the rotation system described herein.

(Pl. Ex. 2). If, as plaintiffs argued below, the right to accumulate water rights is a right guaranteed by the 1916 decree, then the agreement, by its own terms, expressly negates any loss of those rights otherwise created by the signing requirement. Put another way, any deficit in plaintiffs' water rights account resulting from a delay in signing could be adjusted by crediting those rights to plaintiffs. Plaintiffs therefore suffered no detriment that would give them standing.

reasoning.¹⁰ And the conflict plaintiffs perceive between this case and cases from other jurisdictions derives, in defendants' view, from plaintiffs' failure to recognize that the results of particular cases will vary depending on the relationship between the state and federal claims in each case.

The second difficulty with plaintiffs' reading of Oregon cases is that it fails to appreciate what the Oregon courts have held.¹¹ The Oregon analysis begins with *Roberts v. Mills*, 291 Or. 21, 628 P.2d 714 (1981), in which the Oregon Supreme Court anticipated the reasoning in *Smith v. Robinson*, 468 U.S. 992 (1984). The Oregon Supreme Court recognized that an award of attorney fees would be appropriate under section 1988 when fee and non-fee generating claims were combined and the court only reached the non-fee claim. *Roberts v. Mills*, 291 Or., at 24-25 n. 3. It declined, however, to exercise its discretion to award fees in *Mills* because the section 1983 claim in that case was "essentially surplusage." *Ibid*.

The Oregon Supreme Court's reasoning in *Roberts v. Mills* thus anticipated this Court's recognition in *Smith v. Robinson*, *supra*, at 1009 n. 12, that attorney fees would not be appropriate under section 1988 when the federal "claims that provide for attorney's fees ha[ve] nothing to do with a plaintiff's success." The Oregon Supreme Court followed *Roberts v. Mills*, *supra*, in *Oregon State Police Assn. v. State of Oregon*,

¹⁰ In *Smith*, the Court noted that the timing of the plaintiffs' federal constitutional claims demonstrated that they had nothing to do with the plaintiffs' success on the merits of their non-fee generating claims. 468 U.S., at 1009 n. 12. The Court explained that this fact provided an alternative basis for its holding. *Ibid*. Plaintiffs' admissions establish the same point here.

¹¹ Although the Oregon courts' interpretation is not yet developed, its general outlines can be traced.

308 Or. 531, 783 P.2d 7 (1989), *cert. den.* 111 S. Ct. 44 (1990),¹² and the Oregon Court of Appeals in turn followed *Oregon State Police Assn. v. State of Oregon*, *supra*, in this case. None of these cases purports to undo section 1988, as plaintiffs argue. Rather, they all recognize that section 1988 fees are appropriate when the federal claim played a role in the plaintiff's success on the state law claim. *See Oregon State Police Assn. v. State of Oregon*, 308 Or., at 538-39.

To the extent that the Oregon cases have suggested that this determination may take into account the existence of clearly established state law, that suggestion is not inconsistent with either this Court's holdings or the legislative history of section 1988. *Maher v. Gagne*, 448 U.S. 122 (1980), holds that section 1988 authorizes a court to award attorney fees even though the court does not reach the fee generating claim. But neither *Maher* nor the legislative history of section 1988 requires a court to award fees automatically. *Smith v. Robinson*, *supra*, at 1007-08. Rather, the legislative history states that "attorney's fees *may* be allowed even though the court declines to enter judgment for the plaintiff on [the fee-generating] claim." *Maher v. Gagne*, *supra*, at 133 n. 15 (quoting H.R. REP. NO. 94-1558, p. 4, n. 7 (1976); emphasis added); *Smith v. Robinson*, *supra*, at 1006.¹³ This discretion is broad

¹² Plaintiffs begin their petition for certiorari:

The issue presented in this petition is identical to the question raised in another case that is before this Court, *Oregon State Police Ass'n v. State of Oregon*, 308 Or. 531, 783 P.2d 7 (1989), *petition for cert. filed*, April 11, 1990. . . .

Because of the identity of the issues in the two cases, it is respectfully suggested that the immediate case should be consolidated and reviewed on certiorari together with the *Oregon State Police Ass'n* case.

(Pet. Cert. 9-10). The Court denied certiorari in the case plaintiffs claim is identical to theirs. *See* 111 S. Ct. 44 (1990).

¹³ In *Smith*, the Court explained that "Congress did not intend to have

(Footnote continued on next page)

enough to allow the state courts to accommodate each State's own practice of interpreting and reaching state law issues.

It may be that the breadth of this discretion will present a significant federal question in some future case. This case, however, does not provide a good vehicle for deciding whether the discretion manifested in the language and legislative history of section 1988 allows state courts to factor federalism concerns into the analysis of when fees should be awarded. After plaintiffs told the state trial court that their federal claims really did not make any difference to their ability to obtain a preliminary injunction, *Smith v. Robinson*, *supra*, compelled the conclusion the Oregon Court of Appeals reached.

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

Respectfully submitted,
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th[e] authority [to award fees under § 1988] extinguished by the fact that the case was settled or resolved on a non-constitutional ground." 468 U.S., at 1006. To say that a court is not precluded from awarding fees does not mean that it must award them whenever it has discretion to do so. And when a section 1988 claim is raised in state court, the discretion to award fees extends beyond the state trial court's decision and includes the broader federalism concerns that may be articulated by state appellate courts.